Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

BARNEY DOYLE, et al., and
JOSEPH CUNETTA, et al.,

Petitioners,

v.

BELLSOUTH COMMUNICATION SYSTEMS, INC., and
BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does § 2103 of the Employee Commuting Flexibility Act of 1996 (which retroactively amended § 4(a) of the Portal-to-Portal Pay Act of 1947 and extinguished Petitioners' claims against Respondents for travel-related overtime compensation under § 7(a)(1) of the Fair Labor Standards Act of 1938) violate the Takings and Due Process Clauses of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

The following were parties to Case No. 97-5122, U.S. Court of Appeals for the Sixth Circuit:

Plaintiffs/Appellants Barney Doyle, et al.

Barney Doyle
Samuel J. Carroll
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David A. Boshell
D.J. Pollefeyt
J.P. Clark
Keith G. Wickerham
Michael L. Garretson

Plaintiffs/Appellants Joseph Cunetta, et al.

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Respondents

BellSouth Communication Systems, Inc.
BellSouth Telecommunications, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Barney Doyle, et al., and Joseph Cunetta, et al. ("Petitioners"), respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in Case No. 97-5122.

OPINIONS BELOW

The Court of Appeals' April 3, 1998, opinion in Case No. 97-5122, which affirmed the District Court's summary judgment (App. 1-3), has not been reported (*see*, Table-142 F.3d 433), but can be found at 1998 WL 165149.

The District Court's May 22, 1995, order of consolidation and tolling statute of limitations (App. 4-8) has not been reported.

The District Court's June 13, 1996, order denying Respondents' motions for reconsideration of the May 22, 1995, order (App. 9-15) has not been reported.

The District Court's December 3, 1996, order granting Respondents' motions for summary judgment in Case No. 94-2978-D (App. 16-29) has not been reported, but can be found at 1995 U.S. Dist. LEXIS 18874.

STATEMENT OF JURISDICTION

On April 3, 1998, the U.S. Court of Appeals, Sixth Circuit, in Case No. 97-5122, affirmed the District Court's judgment in Case No. 94-2978-D. Justice Stevens, on June

30, 1998, extended, until August 31, 1998, the time for Petitioners to petition for a Writ of Certiorari.

Section 1254(1), Title 28, U.S. Code, confers jurisdiction on this Court to review on a Writ of Certiorari the judgment of the Court of Appeals in Case No. 97-5122.

In accordance with 28 U.S.C. § 2403(a) and Supreme Court Rule 29.4(b), Petitioners have notified the Solicitor General of the United States of their intention to challenge the constitutionality of § 2103 (the retroactivity provision) of the Employee Commuting Flexibility Act of 1996 ("the Commuting Act"), PL. 104-188, 110 Stat. 1755, approved August 20, 1996, which amended 29 U.S.C. § 254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; not shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 7(a)(1) of the Fair Labor Standards Act of 1938, as amended ("the FLSA"), § 207(a)(1), Title 29, U.S. Code:

> "Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 16(b) of the FLSA, 29 U.S.C. § 216(b):

"Damages; right of action; attorney's fees and costs; termination of right of action.

> "Any employer who violates the provisions of . . . section 207 of this title shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages . . . An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State Court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs,

> allow a reasonable attorney's fee to be paid by the defendant, and costs of the action . . . "

Section 4(a) the Portal-to-Portal Pay Act of 1947 ("the Portal Act"), § 254(a), Title 29, U.S. Code (prior to its amendment by the Commuting Act):

> "**Activities not compensable.** Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended . . . , on account of the failure of such employer to pay an employee . . . overtime compensation, for or on account of any of the following activities of such employee engaged in on or after [May 14, 1947] –
>
> > (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

The Employee Commuting Flexibility Act of 1996 ("the Commuting Act"), §§ 2101-2103, PL. 104-188, 110 Stat. 1755, 1928, approved August 20, 1996:

> "SEC.2101. SHORT TITLE.
>
> "This section and sections 2102 and 2103 may be cited as the 'Employee Commuting Flexibility Act of 1996'.

"SEC. 2102. PROPER COMPENSATION FOR USE OF EMPLOYER VEHICLES.

"Section 4(a) of the Portal-to-Portal Act of 1947 (29 U.S.C. 254(a)) is amended by adding at the end the following: 'For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee'.

"SEC.2103. EFFECTIVE DATE.

"The amendment made by section 2101 shall take effect on the date of the enactment of this Act and shall apply in determining the application of section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before such date of enactment but pending on such date."

STATEMENT OF THE CASE

Respondent BellSouth Communication Systems, Inc. ("BSCS"), is a wholly-owned subsidiary of BellSouth Corporation, Atlanta, Georgia, which is publicly traded. At all pertinent times, BSCS was engaged in the business of providing "inside premises" telecommunications services in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

Respondent BellSouth Telecommunications, Inc. ("BST"), also a wholly-owned subsidiary of BellSouth Corporation, was at all pertinent times engaged in the business of providing "outside premises" or "network" telecommunications services in the same nine (9) states.

Petitioner Barney Doyle, on November 23, 1994, brought suit under §§ 7(a)(1) and 16(b) of the FLSA, 29 U.S.C. §§ 207(a)(1) and 216(b), against BSCS in the U.S. District Court, Western District of Tennessee, to recover overtime compensation for himself and other similarly situated BSCS employees who, between 1991 and 1994, had participated in BSCS's Motor Vehicle Usage Program ("the MVUP"). That suit was assigned Civil Action 94-2978. In his complaint, Petitioner Doyle claimed that participating BSCS field service technicians had been engaged in a "principal activity" (for which overtime compensation had been due) when each working day they had driven their stocked (with supplies), specially equipped BSCS-owned trucks from their respective homes to their respective first job assignments and from their respective final job assignments to their respective homes, where the trucks had been kept overnight.[1]

Petitioners Joseph Cunetta, et al., on January 27, 1995, brought suit under §§ 7(a)(1) and 16(b) of the FLSA, 29 U.S.C. §§ 207(a)(1) and 216(b), against BST in the General Jurisdiction Division, Eleventh Circuit Court of

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[1] The "consents to join" Civil No. 94-2978 of Petitioners S.J. Carroll, A.W. Bearded and David A. Boswell were filed on May 5, 1995. On May 15, 1995, those of Petitioners D.J. Pollefeyt and J.P. Clark were filed with the Clerk of the Tennessee District Court.

Florida (Miami-Dade County, Florida), to recover overtime compensation for themselves and other similarly situated BST employees who, between 1991 and 1994, had participated in BST's Home Dispatch Program ("the HDP"). That suit was assigned Case No. 95-1706 (CA 02). On February 14, 1995, BST removed Case No. 95-1706 (CA 02) to the U.S. District Court, Southern District of Florida, which assigned it Case No. 95-293-Civ-Atkins. In their complaint, Petitioners Cunetta, et al., claimed that participating BST field service technicians had been engaged in a "principal activity" (for which overtime compensation had been due) when each working day they had driven their stocked (with supplies), specially equipped BST-owned trucks from their respective homes to their respective first job assignments and from their respective final job assignments to their respective homes, where the trucks had been kept overnight.

BST, on April 19, 1995, moved to transfer Case No. 95-293-Civ-Atkins to the Western District of Tennessee pursuant to 28 U.S.C. § 1404(a). That motion was granted on May 4, 1995. Thereafter, the Clerk of the Tennessee District Court assigned Civil Action No. 95-2372 to the transferred lawsuit.

On May 22, 1995, the District Court issued an order consolidating Civil Actions No. 94-2978 and 95-2372 under the former docket number. In that order, the District Court also stated:

> "On May 17, 1995, an initial scheduling conference was held in case no. 94-2978. At the conference, plaintiffs' counsel indicated that pursuant to 29 U.S.C. § 255(a), a two year statute of limitations period continues to run against any

potential plaintiff until that individual files suit or 'opts into' the class maintaining the action. Plaintiffs' counsel also indicated that the two year period limits damages to the unpaid wages that have accrued two years prior to the time of filing suit or 'opting into' the class.

"It further appears that there is a dispute as to who is a proper member of the class. Until this issue is resolved, the potential plaintiffs cannot be notified nor can it be determined whether they wish to 'opt into' this litigation. Therefore, based on the above, the Court is faced with potential plaintiffs who may or may not wish to 'opt into' this litigation and a statute of limitations that continues to run against these potential plaintiffs, if any, limiting their damages, if any.

"The Court clearly possesses the authority to manage this action including authorization to send notice to any potential plaintiffs and approval of such notice. *See, Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989). The Court also has the authority to require the defendant employers to identify all potential plaintiff class members through discovery. *Id.* It further appears that the two year statute of limitation, 29 U.S.C. § 255(a), is a procedural limitation rather than substantive. *See, Partlow v. Jewish Orphans' Home of Southern Cal.*, 645 F.2d 757, 760 (9th Cir. 1981); *cf., Ott v. Midland-Ross Corporation*, 523 F.2d 1367, 1370 (6th Cir. 1975).

"The ADEA incorporates the enforcement provisions of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.A., § 201, *et seq.* (1982

ed. And Supp. V). *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 167, 110 S. Ct. 482, 485, 107 L. Ed. 2d 480 (1989). The district court, in *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989), concluded the statute of limitations governing ADEA claims could be tolled by equitable considerations. *See, Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 410 (1988). There, the Court found, although not deciding the issue, that plaintiffs presented a facially compelling case for equitable tolling, in part, based on delay occasioned by the Court issuing its ruling on the class membership issue. *Id.* F.R.D. at 410-11.

"Based on the circumstances of this case and upon review of the above case law, the Court concludes that it should toll the statute of limitations until the class membership issue is resolved. The Court takes this action as a precautionary measure to avoid prejudice to those potential plaintiffs who are not currently before the Court. The Court also finds that the purpose of the statute of limitation will not be frustrated by the Court's action as the statute is designed to ensure fairness to defendants and to notify them of claims that they must defend before the claims grow stale. *See, Partlow v. Jewish Orphans' Home of Southern Cal.*, 645 F.2d 757 (9th Cir. 1981) (citation omitted). This ruling does not preclude the Court from reviewing its decision at a later time according to the facts and merits as to each potential plaintiff/class member. *See, Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 410-411 (1988). Tolling the statute of limitations at this time will allow both sides to properly address and brief the issue and permit the Court to more carefully consider the issue.

> "Accordingly, the statute of limitations as to all potential plaintiffs in both these actions shall be tolled from date of entry of this order until the class membership issue has been determined and each prospective plaintiff receives notice of this litigation. The parties will be allowed to brief this issue and the Court may modify, expand and/or vacate this decision at a later time." (Footnote omitted)

The District Court, on June 12, 1996, entered an order denying Respondents' motions for reconsideration of that portion of the May 22, 1995, order which had tolled the statute of limitations. In its June 12, 1996, order, the District Court observed:

> "The plaintiffs have sought discovery of all potential plaintiffs (i.e., similarly situated employees) in the nine-state area where the defendants do business. According to the plaintiffs, the class of potential plaintiffs includes all BellSouth employees in the entire nine-state region who participated in the home dispatch program at any time during the three-year period preceding November 23, 1994, when the earlier of the two cases consolidated into the present case was filed. The defendants have disclosed at least 25 names of employees similarly situated to the plaintiffs.
>
> "The defendants claim that they have made a good faith effort to comply with their disclosure requirements by producing lists of the names and whereabouts of employees similarly situated to the plaintiffs, both in the Memphis area and in the Miami area. The defendants state, furthermore, that they are painstakingly trying to respond to the plaintiffs' discovery request as

quickly as possible. The defendants assert that they have no central historical database indicating home dispatch status for individual employees for the relevant time period, and that BellSouth is attempting to compile this information through a search of historical fleet maintenance records. The defendants claim to have nearly completed a list of approximately 5,000 employees in the nine-state area who may have participated in the home dispatch program during the relevant time period. The defendants represent that they are willing to produce the list when complete, subject to a protective order and pending a determination by the court of who is similarly situated.

* * *

"In the administration of an FLSA action, this court clearly possesses the authority to require of the defendants disclosure of the names and addresses of potential class members. To date, the defendants have failed to produce, to the satisfaction of the court, the names and addresses of potential class members who should receive notice of the pending action. Although 29 U.S.C. § 257 does not provide by its plain language tolling of the limitations period under § 255 of the same title, with regard to an individual not specifically named as a party plaintiff, in any instance other than the filing of a consent to become a party plaintiff, '[i]t is well established that equitable tolling is read into every federal statute of limitation'. *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979).

"After a thorough review of the record and law, the court finds that the equities warrant tolling of the limitations period as to all potential

> claimants until such time as the defendants comply with the court's order to produce the names and addresses of all potential class members. The court herein defines 'potential class members' as any of the defendants' present or former employees, in the nine-state area . . . who were non-salaried and non-management during the relevant period and engaged in the defendant's program generally referred to as 'home dispatch'. The court will then decide who is, and who is not, similarly situated. Furthermore, the May 23, 1995 Order Tolling Statute Of Limitations is subject to review according to each potential plaintiff/class member's facts and merits, and subject to be modified, expanded or vacated, in whole or in part, at any time by this court."

On June 12, 1996, the "consents to join" of 1,870 additional former participants in BST's HDP were filed with the Clerk of the District Court. The District Court at no time:

> (a) determined that BSCS and BST had complied with its order to produce the names and addresses of all potential class members;
>
> (b) held that the individuals who had filed "consents to join" were "similarly situated"; and
>
> (c) approved a form of notice to potential class members.

The Commuting Act was signed by the President on August 20, 1996. BSCS, on September 19, 1996, moved for summary judgment of dismissal on the ground that the Commuting Act had retroactively amended the Portal Act and extinguished Petitioners' claims for travel-related

overtime compensation under the FLSA. BST filed a similar motion on September 24, 1996.[2]

One of the arguments advanced by Petitioners in opposition to the BSCS and BST motions for summary judgment was that, in the absence of explicit legislative findings, the Commuting Act's retroactivity provision, § 2103, violated Petitioners' rights under the Fifth Amendment's Due Process Clause. The District Court, on December 3, 1996, rejected Petitioners' Due Process Clause challenge to the Commuting Act[3] and directed entry of final summary judgment for BSCS and BST.

Petitioners appealed. In the absence of a single reported decision declaring a federal statute unconstitutional by reason of its retroactivity, and concerned that sanctions could be imposed against them pursuant to Rule 38, Federal Rules of Appellate Procedure,[4]

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[2] Neither BSCS nor BST moved for leave to file pleadings invoking the Commuting Act.

[3] The District Court stated:

> "Finally, Plaintiffs contend that in the absence of legislative findings, the due process clause bars the retroactive application of the [Commuting] Act. The court finds this argument to be contrary to well settled law, and therefore without merit. Congress has the power to enact legislation that has retrospective application. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)."

[4] Rule 38, Federal Rules of Appellate Procedure, is entitled "Damages and Costs for Frivolous Appeals" and provides:

> "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to

Petitioners did not pursue their Due Process Clause challenge to § 2103 of the Commuting Act before the Sixth Circuit. Instead, Petitioners contended that the District Court had erroneously determined that the Respondents had satisfied the Commuting Act's "normal commuting area for the employer's business or establishment" criterion.[5]

On April 3, 1998, the Court of Appeals affirmed the District Court's final summary judgment for BSCS and BST. Judge Merritt's opinion for the Sixth Circuit reasoned:

> "Plaintiffs' primary argument on appeal is that the district court improperly interpreted the requirement of the Employee Commuting Flexibility Act that the plaintiffs' commute be within the 'normal commuting area for the employer's business' if overtime compensation is to be

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respond, award just damages and single or double costs to the appellee."

[5] The District Court found and concluded that:

"Next, the court must examine whether the use is 'within the normal commuting area for the employer's business'. Pursuant to the CBA, home dispatch participants' commute to their first assignment was limited to 35 miles . . . For trips above 35 miles, the CBA provided that home dispatch employees would be paid a travel premium . . . Thus from the pleadings, affidavits, and undisputed facts, the court finds that the commute for home dispatch employees would not be any longer than for non home dispatch employees. Where the commute exceeded the negotiated range, the contract provided for a travel premium. Thus, the court finds that this prong of the test has been satisfied."

> denied. Plaintiffs did not raise the present argument below, and defendants correctly contend that the argument is waived. Counsel for plaintiffs candidly advised the court at oral argument that new lawyers have come into the case and have substantially changed the theory of their case. If this court now adopted plaintiffs' new arguments, the court would have to remand to the court below a new fact issue about the scope of the 'normal commuting area' and new legal issues concerning the burden of proof on this question. These issues were not litigated in the court below, and the parties agree that millions of dollars in damages may ride on how these issues are decided. This is not a class action, but our determination of these new issues could become a precedent binding thousands of employees of the defendants. Under these circumstances we believe it unwise and inappropriate to consider plaintiffs' new theory for the first time on appeal."

This Court, on June 25, 1998, issued its decision in Case No. 97-42, *Eastern Enterprises v. Apfel*, ___ U.S. ___, 118 S. Ct. 2131, *reversing Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997) (hereinafter referred to as "*Eastern Enterprises*"). In an opinion written by Justice O'Connor and joined by the Chief Justice and Justices Scalia and Thomas, a plurality held that the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"), P.L. 102-486, Title XIX, Subtitle C, 106 Stat. 3036, *codified as* 26 U.S.C. §§ 9701-9722 (1994 ed. and Supp. II), violated the Takings Clause of the Fifth Amendment to the U.S. Constitution because it had improperly placed "a severe, disproportionate and extremely retroactive burden on Eastern." ___ U.S. at ___, 118 S. Ct. at 2153.

Justice Thomas, in a concurring opinion, expressed a willingness to reconsider *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798), and to hold that the Ex Post Facto Clause of the Constitution, Art. I, § 9, cl. 3, applies outside the criminal context. ___ U.S. at ___, 118 S. Ct. at 2154.

Finally, Justice Kennedy, concurring in the judgment and dissenting in part, concluded that the Coal Act was invalid under the Fifth Amendment's Due Process Clause. ___ U.S. at ___, 118 S. Ct. at 2154-2160.

Petitioners, on June 26, 1998, applied under Supreme Court Rule 13.5 to Sixth Circuit Justice John Paul Stevens for a 60 day extension of time in which to file a petition for writ of certiorari directed to the Sixth Circuit's decision in Case No. 97-5122. In that application, Petitioners in pertinent part stated:

> "7. The Court, on June 25, 1998, issued its decision in *Eastern Enterprises v. Apfel*, ___ U.S. ___ (Docket No. 97-42), holding unconstitutional the retroactivity provisions of the Coal Industry Retiree Health Benefit Act of 1992 ('the Coal Act'), 26 U.S.C. 9701-9722 (1994 ed. and Supp. II). Petitioners believe that the rationale of the Court's decision in *Eastern Enterprises, supra*, applies to and renders unconstitutional § 2103 of P.L. 104-188. However, Petitioners will be unable to prepare and file a petition for writ of certiorari advancing that argument by their July 1, 1998, deadline."

Justice Stevens, on June 30, 1998, in Application A-9, extended until August 31, 1998, the time within which Petitioners may file a petition for writ of certiorari

directed to the Sixth Circuit's decision in Case No. 97-5122.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD PERMIT PETITIONERS TO CHALLENGE THE CONSTITUTIONALITY OF § 2103 OF THE COMMUTING ACT.

In *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944), this Court stated:

> "It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The [FLSA] clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. *Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the [FLSA].*" (Emphasis supplied)

In § 2102 of the Commuting Act, Congress modified the foregoing principle. Congress' directions (in § 2103) that

the Commuting Act be given retroactive effect[6] and that pending claims for travel-based overtime compensation under the FLSA be extinguished have posed three (3) important questions under the Takings and Due Process Clauses of the Fifth Amendment to the Constitution, as interpreted in *Eastern Enterprises*:

First, has § 2103 of the Commuting Act forced a considerable economic or financial burden upon those whose claims for travel-based overtime compensation have been extinguished?

Second, has § 2103 of the Commuting Act interfered with the reasonable investment-backed expectations of those whose claims for travel-based overtime compensation have been extinguished?

Third, does § 2103 of the Commuting Act implicate fundamental principles of fairness underlying the Takings and Due Process Clauses of the Fifth Amendment to the Constitution?

Eastern Enterprises stands as this Court's first invalidation of federal legislation by reason of its retroactivity.

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[6] In *Baker v. GTE North Incorporated*, 927 F. Supp. 1104 (N.D. Ind. 1996), the District Court held that the participants in an HDP identical to those of Respondents were entitled to travel-related overtime compensation under the FLSA. As noted in House Report 104-585, 104th Congress, 2d Session, May 20, 1996, in enacting the Commuting Act, Congress intended to overrule that decision, which was reversed in *Baker v. GTE North Incorporated*, 110 F.3d 28 (7th Cir. 1997). The Seventh Circuit held that the Commuting Act was retroactive and had extinguished the claimants' entitlements to travel-related overtime compensation under the FLSA.

Petitioners, in prosecuting their appeal to the Sixth Circuit, could not have anticipated such a dramatic development in this Court's approach to the Takings and Due Process Clauses of the Fifth Amendment to the Constitution.[7]

Prior to the expiration of their time in which to seek review of the April 3, 1998, judgment of the Court of Appeals, Petitioners (in their application to Justice Stevens for an extension of time) signaled to this Court their reliance upon the decision in *Eastern Enterprises* for the proposition that § 2103 of the Commuting Act is unconstitutional. Under these circumstances, Petitioners should be permitted to challenge the constitutionality of that statute.

Because this Court has established clear criteria in *Eastern Enterprises*, Petitioners believe that the constitutionality of § 2103 of the Commuting Act under the Takings and Due Process Clauses of the Fifth Amendment to the Constitution should be addressed, in the first instance, by the Sixth Circuit.[8]

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[7] Analogously, in *Johnson v. United States*, 520 U.S. 461 (1997), this Court held that for purposes of Rule 52(b), Federal Rules of Criminal Procedure, due to the intervening decision in *United States v. Gaudin*, 515 U.S. 506 (1995), the District Court's failure to submit to the jury the issue of materiality in a perjury prosecution constituted "plain error", which was reviewable on appeal notwithstanding the absence of a timely objection.

[8] The Court of Appeals could, in its discretion, remand the cause to the District Court for the entry of *Eastern Enterprises*-based factual findings upon which Petitioners' constitutional claims would thereafter be evaluated.

II.

BY GRANTING THE WRIT, THIS COURT WOULD PRESERVE THE TRAVEL-BASED OVERTIME COMPENSATION CLAIMS OF THE AS YET UNIDENTIFIED AND UN-NOTIFIED POTENTIAL MEMBERS OF THE PLAINTIFF CLASS.

Between ten thousand (10,000) and twenty thousand (20,000) current and former employees of BSCS and BST participated in the MVUP and the HDP between 1991 and 1994. Of those, fewer than two thousand (2,000) have filed "consents to join". The remaining participants are as yet unidentified and un-notified.

The result of the District Court's entry of final summary judgment in favor of BSCS and BST was the nullification of its orders equitably tolling the FLSA's statute of limitations with respect to the travel-based overtime compensation claims of the as yet unidentified and un-notified potential members of the plaintiff class.

The Sixth Circuit purported to act in the interests of those as yet unidentified and un-notified members of the plaintiff class when it declined to consider Petitioners' challenge to the District Court's finding that the Commuting Act's "normal commuting area for the employer's business" criterion had been satisfied. However, in so ruling the Court of Appeals also permanently time-barred the claims of those very persons.

Only by granting the Writ of Certiorari could this Court insure that the as yet unidentified and un-notified members of the plaintiff class would not be time-barred from challenging the constitutionality of § 2103 of the

Commuting Act and from prosecuting their claims for travel-related overtime compensation under the FLSA.

CONCLUSION

This Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (Case No. 97-5122) should be granted.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 97-5122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BARNEY DOYLE, et al.,	)	
Plaintiffs-Appellants,	)	**ON APPEAL FROM**
	)	**THE UNITED STATES**
V.	)	**DISTRICT COURT**
	)	**FOR THE WESTERN**
BELLSOUTH COMMUNICATIONS SYSTEMS, INC., et al.,	)	**DISTRICT OF TENNESSEE**
	)	
Defendants-Appellees.	)	(Filed Apr. 3, 1998)
	)	

Before MERRITT, CLAY, Circuit Judges; and BELL, District Judge*

MERRITT, Circuit Judge. Plaintiffs seek overtime compensation under the Fair Labor Standards Act for commuting in company-owned vehicles between home and work sites. Plaintiffs are a group of installation and repair technicians for the phone company who participate in a voluntary "home dispatch program" that allows them to travel to their first job directly from home and from their last job directly to home without going to an "office" to receive their assignments.

Specifically, this appeal concerns statutory construction of the Employee Commuting Flexibility Act of 1996,

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* The Honorable Robert Holmes Bell, District Judge, United States District Court for the Western District of Michigan, sitting by designation.

which amended Section 4(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 254. Section 254 now provides that "the use of an employer's vehicle for travel by an employee . . . shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business. . . . " The amendment was expressly made applicable to pending cases. 29 U.S.C. § 254(a) ("no employer shall be subject to liability under the Fair Labor Standards Act . . . on account of any of the following activities of such employee engaged in on or after *May 14, 1947*. . . . "). The district court granted summary judgment for defendants on the plain language of the statute.

Plaintiffs' primary argument on appeal is that the district court improperly interpreted the requirement of the Employee Commuting Flexibility Act that the plaintiffs' commute be within the "normal commuting area for the employer's business" if overtime compensation is to be denied. Plaintiffs did not raise the present argument below, and defendants correctly contend that the argument is waived. Counsel for plaintiffs candidly advised the court at oral argumnemt that new lawyers have come into the case on appeal and have substantially changed the theory of their case. If this court now adopted plaintiffs' new arguments, the court would have to remand to the court below a new fact issue about the scope of the "normal commuting area" and new legal issues concerning the burden of proof on this question. These issues were not litigated in the court below, and the parties agree that millions of dollars in damages may ride on how these issues are decided. This is not a class action, but our determination of these new issues could become

a precedent binding thousands of employees of the defendants. Under these circumstances we believe it unwise and inappropriate to consider plaintiffs' new theory for the first time on appeal.

The failure to raise the issue below is fatal to plaintiffs' appeal. In general, issues not presented to the district court but raised for the first time on appeal are not properly before the Court. *Taft Broadcasting Corp. v. United States*, 929 F.2d 240, 243-45 (6th Cir. 1991); *J.C. Wyckoff & Assoc. v. Standard Fire Ins.*, 936 F.2d 1474, 1488 (6th Cir. 1991). In cases where there are unusual circumstances or where the failure of this Court to address the issue would result in a miscarriage of justice we may deviate from the general rule. *Taft*, 929 F.2d at 245. This case presents no such situation. Accordingly, we affirm the judgment of the district court.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT FOR TENNESSEE WESTERN DIVISION

BARNEY DOYLE, for and in behalf of himself and other employees similarly situated,	]	
Plaintiff,	]	
vs.	]	**Civil No. 94-2978-H/A**
BELLSOUTH COMMUNICATION SYSTEMS, INC., a subsidiary of BELLSOUTH CORPORATION, d/b/a BELLSOUTH TELECOMMUNICATIONS,	]	
Defendants.	]	

JOSEPH CUNETTA, et al.,	]	
Plaintiffs,	]	
vs.	]	**No. 95-2372-H/BRE**
BELLSOUTH TELECOMMUNICATIONS, INC., d/b/a SOUTHERN BELL TELEPHONE AND TELEGRAPH, CO.,	]	
Defendant.	]	

JOINT ORDER OF CONSOLIDATION AND ORDER TOLLING STATUTE OF LIMITATIONS
(Filed May 22, 1995)

In accordance with Rule 42(a) of the Federal Rules of Civil Procedure, the Court concludes the above actions

share common questions of law and fact and should be consolidated for pretrial proceedings. It further appears these actions may share the same or related corporate entities as defendants. Accordingly, the Court hereby **CONSOLIDATES** these cases for pretrial proceedings. The Court may review this ruling at a later time should circumstances warrant such action.

The parties are instructed to file all pleadings using the lead case style of *Doyle et al., v. BellSouth, et al.,* No. 94-2978, USDC (W.D.Tenn.). The parties should only use the docket number for the *Doyle* case, No. 94-2978-H/A, on all pleadings. The Clerk shall make the appropriate changes to the docket sheets and see that all the attorneys for both cases receive copies of any orders or action taken in these cases. Out of town counsel may participate in any pretrial scheduling conferences by telephone upon request and where appropriate.

Tolling the Statute of Limitations

These cases involve a dispute over compensation allegedly due plaintiffs for work done in excess of their regularly scheduled forty hour work week. Plaintiffs and others similarly situated employees of the defendants claim they are entitled to compensation for the time spent traveling to and from their residences to different work locations using company vehicles under defendants' "Motor Vehicle Usage Program" ("MVUP"). Plaintiffs also seek compensation for time spent preparing to go on these job sites and other activities. Plaintiffs filed this

action pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (the "Act" or "FLSA"), 29 U.S.C. § 216(b) as amended.

On May 17, 1995, an initial scheduling conference was held in case no. 94-2978. At the conference, plaintiffs' counsel indicated that pursuant to, 29 U.S.C. § 255(a)[1], a two year statute of limitation period continues to run against any potential plaintiff until that individual files suit or "opts into" the class maintaining the action. Plaintiffs' counsel also indicated that the two year period limits damages to the unpaid wages that have accrued two years prior to the time of filing suit or "opting into" the class.

It further appears that there is a dispute as to who is a proper member of the class. Until this issue is resolved, the potential plaintiffs cannot be notified nor can it be determined whether they wish to "opt into" this litigation. Therefore, based on the above, the Court is faced with potential plaintiffs who may or may not wish to "opt into" this litigation and a statute of limitations that continues to run against these potential plaintiffs, if any, limiting their damages, if any.

The Court clearly possesses the authority to manage this action including authorization to send notice to any potential plaintiffs and approval of such notice. *See, Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct.

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[1] The Court assumes this section of the Act provides the applicable statute of limitation period as neither the attorneys or the Court have had the opportunity to brief or review this issue. It is agreed upon that a two year statute of limitation period is running against potential plaintiffs.

482, 107 L.Ed.2d 480 (1989). The Court also has the authority to require the defendant employers to identify all potential plaintiff class members through discovery. *Id.* It further appears that the two year statute of limitation, 29 U.S.C. § 255(a), is a procedural limitation rather than substantive. *See, Partlow v. Jewish Orphans' Home of Souther* [sic] *Cal.*, 645 F.2d 757, 760 (9th Cir. 1981), *cf., Ott v. Midland-Ross Corporation*, 523 F.2d 1367, 1370 (6th Cir. 1975).

The ADEA incorporates the enforcement provisions of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. § 201 *et seq.* (1982 ed. and Supp. V). *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 167, 110 S.Ct. 482, 485, 107 L.Ed.2d 480 (1989). The district court, in *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989), concluded the statute of limitations governing ADEA claims could be tolled by equitable considerations. *See, Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 410 (1988). There, the Court found, although not deciding the issue, that plaintiffs presented a facially compelling case for equitable tolling, in part, based on delay occasioned by the Court issuing its ruling on the class membership issue. *Id.* F.R.D. at 410-11.

Based on the circumstances of this case and upon review of the above case law, the Court concludes it should toll the statute of limitations until the class membership issue is resolved. The Court takes this action as a precautionary measure to avoid prejudice to those potential plaintiffs who are not currently before the Court. The Court also finds that the purpose of the statute of limitation will not be frustrated by the Court's action as the

statute is designed to ensure fairness to defendants and to notify them of claims that they must defend before the claims grow stale. *See, Partlow v. Jewish Orphans' Home of Souther* [sic] *Cal.*, 645 F.2d 757 (9th Cir. 1981) (citation omitted). This ruling does not preclude the Court from reviewing its decision at a later time according to the facts and merits as to each potential plaintiff/class member. *See, Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 410-11 (1988). Tolling the statute of limitations at this time will allow both sides to properly address and brief the issue and permit the Court to more carefully consider the issue.

Accordingly, the statute of limitations as to all potential plaintiffs in both these actions shall be tolled from date of entry of this order until the class membership issue has been determined and each respective plaintiff receives notice of this litigation. The parties will be allowed to brief this issue and the Court may modify, expand and/or vacate this decision at a later time.

IT IS SO ORDERED, this the 22 day of May, 1995.

/s/ Odell Horton
ODELL HORTON, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

BARNEY DOYLE, et al.,

Plaintiffs,

vs. No. 94-2978-D

BELLSOUTH COMMUNICATION SYSTEMS, INC., a subsidiary of BELLSOUTH CORPORATION, d/b/a BELLSOUTH TELECOMMUNICATIONS, et al.,

Defendants.

ORDER ON DEFENDANTS' MOTIONS FOR RECONSIDERATION OF STATUTE OF LIMITATIONS TOLLING ISSUE

(Filed Jun. 13, 1996)

Before the court are the motions of defendants BellSouth Communication Systems, Inc. (BCS) and BellSouth Telecommunications, Inc. (BST) (collectively, "the defendants" or "BellSouth"), for reconsideration of the court's May 23, 1995 Joint Order Of Consolidation And Order Tolling Statute Of Limitations.

FACTS AND PROCEDURAL POSTURE

This consolidated case involves a dispute over compensation allegedly due the plaintiffs for time spent traveling to and from their residences and different work

locations in company vehicles under the defendants' home dispatch program, as well as time spent preparing to go on these job sites. The underlying action is brought under section 16(b) [29 U.S.C. § 216(b)] of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, (FLSA).

The plaintiffs have sought discovery of all potential plaintiffs (i.e., similarly situated employees) in the nine-state area where the defendants do business.[1] According to the plaintiffs, the class of potential plaintiffs includes all BellSouth employees in the entire nine-state region who participated in the home dispatch program at any time during the three-year period preceding November 23, 1994, when the earlier of the two cases consolidated into the present case was filed. The defendants have disclosed at least 25 names of employees similarly situated to the plaintiffs.

The defendants claim that they have made a good faith effort to comply with their disclosure requirements by producing lists of the names and whereabouts of employees similarly situated to the plaintiffs, both in the Memphis area and in the Miami area. The defendants state, furthermore, that they are painstakingly trying to respond to the plaintiffs' discovery request as quickly as possible. The defendants assert that they have no central historical database indicating home dispatch status for individual employees for the relevant time period, and that BellSouth is attempting to compile this information

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[1] Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

through a search of historical fleet maintenance records. The defendants claim to have nearly completed a list of approximately 5,000 employees in the nine-state area who may have participated in the home dispatch program during the relevant time period. The defendants represent that they are willing to produce the list when complete, subject to a protective order and pending a determination by the court of who is similarly situated.

In its *sua sponte* Order, the court tolled the two year statute of limitations under 29 U.S.C. § 255(a). In so ruling, the court weighed the harm to the defendants in tolling the statute of limitations against the harm which would be occasioned upon the entire class of potential plaintiffs should the statute of limitations be allowed to run. The court found that, because the § 255(a) limitation was fundamentally procedural rather than substantive in nature, and because the defendants were not prejudiced by the tolling in that they were on notice of the nature and extent of the potential claims against them, tolling the statute of limitations was warranted as an equitable, precautionary measure to avoid prejudice to those potential plaintiffs who were not currently before the court, until the class certification issue could be determined and each potential plaintiff received notice of the pending litigation was warranted. The court reserved the right to review and modify or vacate its decision in light of the parties' briefs, the totality of facts and circumstances surrounding this case, and the facts and merits of each potential plaintiff/class member as these persons came to be known.

DISCUSSION

The court maintains that it clearly possesses the authority to manage the action, including the power of approval over any proposed notice and even the power to send notice to any potential plaintiff. *See Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). *Sperling* was [an] action brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.*, (ADEA). Plaintiffs allegedly discharged or demoted on account of their age attempted to "certify" a class under 29 U.S.C. § 216(b), as incorporated into the ADEA by 29 U.S.C. § 626(b). The district court held that it was not inconsistent with the Congress' restrictive intent behind the Portal-to-Portal Act of 1947, 29 U.S.C. § 251, *et seq.*, and broad remedial intent behind the FLSA and the ADEA to equitably toll the two-year statute of limitations in 29 U.S.C. § 255(a) or to send notice to putative class members. *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 410, *aff'd* 862 F.2d 439 (3rd Cir. 1988), *aff'd*, 493 U.S. 165 (1989), *supra*. On a certified interlocutory appeal, the court of appeals stated that the notice issue "arises under both the FLSA and the ADEA." 862 F.2d at 444. The court of appeals went on to posit that "there is no legal impediment to court authorized notice in an appropriate case." *Id.* at 447; *see Braunstein v. Eastern Photographic Labs*, 600 F.2d 335 (2nd Cir. 1978) (*per curiam*), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1046 (1979); *see also United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986). The Supreme Court went one step further than the court of appeals, to state decisively that, pursuant to Fed. R. Civ. P. 83, district

courts have a managerial responsibility to assure that joinder of additional parties in representative or class action is done in an efficient and proper way. 493 U.S. at 170-74. Furthermore, the Court opined that, because the trial court is inevitably involved in cases where there are numerous plaintiffs entering written consents, early judicial intervention in case management (e.g., notice requirements) better defines the contours of the action and thereby benefits the parties. *Id.* at 171-72. Important considerations of benefit to the court include (1) avoiding a multiplicity of duplicative suits, (2) promoting settling, and (3) expediting the disposition of the action. *Id.* at 172.

The defendants argue that a later disposition of *Sperling* by the Third Circuit Court of Appeals in 1994, at 24 F.3d 463, drawing a distinction between the opt-in provisions of section 7 [29 U.S.C. § 257] of the Portal-to-Portal Act and the opt-out provisions of Fed. R. Civ. P. 23 incorporated into class actions brought under Title VII, a progenitor of ADEA, *see Sperling*, 24 F.3d at 470, should persuade the court that legal tolling under the FLSA in a non-ADEA action is contrary to Congressional intent. The court is not so persuaded.

In its 1947 enactment of the Portal-to-Portal Act, the Congress responded to the Supreme Court's decision in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 487, 90 L.Ed. 1515 (1946). *See* 29 U.S.C. § 251 (Congress included, within section 1 [29 U.S.C. § 251] of the Portal-to-Portal Act, a statement of its findings and policy regarding the perceived need for the act); *see also Cook*, 795 F.2d at 990-91. Courts have generally construed the Congressional intent in the Portal-to-Portal Act as an emergency measure meant to foreclose retroactively the

thousands of FLSA suits filed in the wake of the Court's 1946 *Anderson* decision, which decision the Congress found to extend beyond the scope of legislative intent in the 1938 passage of the FLSA. *See* 29 U.S.C. § 251; *Sperling*, 493 U.S. at 173, 110 S.Ct. at 488; *see also Cook*, 795 F.2d at 990-91.

The *Cook* decision is illustrative of the majority view that, although the Congress intended the Portal-to-Portal Act to eliminate champertous representative actions brought under the FLSA following *Anderson*, the act does not evidence any intention on the part of Congress to curb courts' authority to order production of names and addresses of potential class members to facilitate notifying them of a pending FLSA action. *Cook*, 795 F.2d at 991; *accord Sperling*, 493 U.S. at 173, 110 S.Ct. at 488; *Partlow v. Jewish Orphans' Home of Southern California, Inc.*, 645 F.2d 757 (9th Cir. 1981); *Braunstein*, 600 F.2d at 336.

In the administration of an FLSA action, this court clearly possesses the authority to require of the defendants disclosure of the names and addresses of potential class members. To date, the defendants have failed to produce, to the satisfaction of the court, the names and addresses of potential class members who should receive notice of the pending action. Although 29 U.S.C. § 257 does not provide by its plain language tolling of the limitations period under § 255 of the same title, with regard to an individual not specifically named as a party plaintiff, in any instance other than the filing of a consent to become a party plaintiff, "[i]t is well established that equitable tolling is read into every federal statute of limitation." *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979).

CONCLUSION

After a thorough review of the record and law, the court finds that the equities warrant tolling of the limitations period as to all potential claimants until such time as the defendants comply with the court's order to produce the names and addresses of all potential class members. The court herein defines "potential class members" as any of the defendants' present or former employees, in the nine-state area, *supra* note 1, who were non-salaried and non-management during the relevant period and engaged in the defendant's program generally referred to as "home dispatch". The court will then decide who is, and who is not, similarly situated. Furthermore, the May 23, 1995 Order Tolling Statute Of Limitations is subject to review according to each potential plaintiff/class member's facts and merits, and subject to be modified, expanded or vacated, in whole or in part, at any time by this court.

IT IS SO ORDERED this 12th day of June, 1996.

/s/ Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BARNEY DOYLE, et al.,

and Case No. 94-2978-D

JOSEPH CUNETTA, et al.,

Plaintiffs,

vs.

BELLSOUTH COMMUNICATIONS SYSTEMS, INC., a subsidiary of BELLSOUTH CORPORATION d/b/a BELLSOUTH TELECOMMUNICATIONS,

and

BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

Defendants.

ORDER ON DEFENDANTS' BELLSOUTH COMMUNICATION SYSTEMS, INC. AND BELLSOUTH TELECOMMUNICATIONS, INC.; MOTIONS FOR SUMMARY JUDGMENT

(Filed Dec. 3, 1996)

Before the court are motions for Summary Judgment under Fed. R. Civ. P. 56(c) filed by Defendants BellSouth Communications systems, Inc., ("BSC") and BellSouth Telecommunications, Inc. ("BST") alleging that Plaintiffs'

claims are barred by the Employee Commuting Flexibility Act of 1996.

The basic facts for purposes of this motion are undisputed and are set forth in Defendants' memorandum. The court accepts those as true for purposes of this motion.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs are BST or BSC employees who borrowed BST or BSC vehicles to commute to work. Plaintiffs who participated in this "home dispatch" program allege that the time they spent commuting from home to work and from work to home in the company owned vehicle constituted compensable hours worked. (Complaint.)

Plaintiffs borrowed these vehicles pursuant to an agreement reached in 1984 between the Communications Workers of America ("CWA") and BST. (Article 9.07, pp. 154 ff. of the Collective Bargaining Agreement ("CBA"); excerpts from CBA attached as Exhibit 1)). This agreement specified that participants in the home dispatch program would not be paid for the drive between their residence and their work locations. (CBA Article 9.07 F, p. 158).

Pursuant to the CBA, the home dispatch participants' commute to their first assignment was limited to a maximum of 35 miles. (CBA Article 9.07 C.1 and 9.07 E, pp. 155, 157). This distance was negotiated to ensure that home dispatch participants would not have to drive further than non-home dispatch participants. (Affidavit of Ronald Fairbanks, ¶ 13, attached as Exhibit 2). The CBA also allowed the union and BST and BSC to negotiate a

shorter maximum commute if warranted by urban congestion or natural barriers. *Id.*, (CBA Article 9.07 E. 1, 2, pp. 157-58). Furthermore, a computer program was utilized which gave home dispatch participants a first and last assignment as close as possible to their home. (Fairbanks Aff., ¶ 13). As a result, home dispatch participants' commutes were within the normal distances driven by the BST employees who did not elect to borrow company vehicles to commute from their homes to work and work to home. *Id.*

SUMMARY JUDGMENT

Summary Judgment pursuant to Federal Rules of Civil Procedure 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimark, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986). The burden on the party moving for summary judgment may be discharged by pointing out that there is an absence of evidence to support the nonmovinbg party's case." *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 182 (6th Cir.), *cert. denied*, 113 S.Ct. 831 (1992) (the moving party need not

support its motion with affidavits or other similar materials "negating" the opponent's claim) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Id.* The party opposing the motion must "do more than simply show that there is some meta-physical doubt as to the material facts." *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In short, the nonmoving party may not oppose a properly supported motion for summary judgment by mere reliance on the pleadings. *Celotex*, 477 U.S. at 324. "[I]n the 'new era' of summary judgments that has evolved from the holdings of the Supreme Court in *Anderson, Celotex and Matsushita*, trial courts have been afforded considerably more discretion in evaluating the weight of the nonmoving party's evidence." *Cox v. Kentucky Dep't of Trans.*, 53 F.3d 146, 150 (6th Cir. 1995). "If the record taken in its entirety could not convince a rational trier of fact to return a verdict in favor of the nonmoving party, the motion must be granted. *Id.*

This case arose because of a determination or opinion by the Department of Labor ("DOL") that commuting time for an employee is compensable. (August 5, 1994 DOL letter).

On August 2, 1996, Congress passed the Employee Commuting Flexibility Act of 1996 ("The Act"), which

was signed into law and became effective August 20, 1996. The Act amended Section 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254. Section 254(a) makes clear that commuting in an employer owned vehicle does not create compensable time.

Specifically the Act provides:

> Section 4(a) of the Portal-to-Portal Act of 1947 (29 U.S.C. 254(a)) is amended by adding at the end the following: "For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee."

Congress expressly made the Act applicable to existing or pending cases, and thus retroactive. The instant action was filed November 23, 1994, and is unequivocally covered in time by the legislation.

The Act provides two criteria: (1) the use of [the employer's] vehicle must be within the normal commuting area for the employer's business or establishment, and (2) the use must be subject to an agreement on the part of the employer and employee or representative of the employer.

At all times relevant to the events in question, a Collective Bargaining Agreement ("CBA") was in effect

between Plaintiffs and Defendants, and the CWA was the duly authorized bargaining agent for the Plaintiffs' claims. (Ex. 2, Defendants' Memorandum of Law). The subject activity, the home dispatch program, was covered by the Collective Bargaining Agreement.

As a part of the 1992 CBA, Defendants implemented a motor vehicle usage program which was described with particularity at Section 9.07 of the CBA, and governed by the CBA.

The motor vehicle usage or home dispatch program was negotiated with the CWA in 1984. The program was subsequently implemented at various intervals in districts across the region. (Fairbank's Affidavit ¶ 3).

Thus, the requirement that the use be subject to an agreement on the part of the employer/employee is satisfied.

Next, the court must examine whether the use is "within the normal commuting area for the employer's business." Pursuant to the CBA, home dispatch participants' commute to their first assignment was limited to 35 miles. (CBA Art. 9.07 C.1 and 9.07 E; Fairbanks Affidavit ¶ 13) For trips above 34 miles, the CBA provided that home dispatch employees would be paid a travel premium (Fairbank's Affidavit ¶ 13), and Ex 2 to BSC's motion for Summary Judgment. Thus from the pleadings, affidavits, and undisputed facts, the court finds that the commute for home dispatch employees would not be any longer than for non home dispatch employees. Where the commute exceeded the negotiated range, the contract provided for a travel premium. Thus, the court finds that this prong of the test has been satisfied.

Plaintiffs contend that notwithstanding the legislation, there exists genuine issues of material fact such that Summary Judgment would be improper. Specifically, Plaintiffs aver that an issue exists as to whether the Plaintiffs used company vehicles for a purpose other than for travel which was integral and indispensable to their principal activities and which benefitted BSC and BST. Plaintiffs postulate:

> [t]he plain meaning of the 1996 amendment to the Portal Act is that an employee who uses an employer's vehicle *solely* "for travel" is not entitled to compensation therefor under the Fair Labor Standards Act. By inference, however, an employee who uses an employer's vehicle "for travel" *and* for another purpose "integral and indispensable" to his or her "principal activity" which benefits his or her employer is entitled to receive [overtime] compensation under the Fair Labor Standards Act for his or her performance of the latter function.

(Plaintiff's Response to Defendants' Summary Judgment motion).

Plaintiffs argue that there exists a genuine issue of material fact whether Plaintiffs, as participants in the BSC and BST Home Dispatch Programs, satisfied the "another purpose" criterion when they transported tools and equipment in company vehicles to and from the work sites designated by BSC and BST.

A fundamental rule of statutory construction is where a statute is clear and unambiguous on its face, the court should not resort to legislative intent. The wording of the subject Act is clear and unambiguous in that it

provides "the use of an employee's vehicle for travel by an employee and activities . . . which are incidental to the use of such vehicle for commuting shall not be considered part of the employer's principle activities . . . " The home dispatch policy and the CBA's "defined" use is consistent with the language of the Act. Plaintiff has not provided any affidavits, or other statements to evince a use contrary to that described in the CBA and contemplated by the Act.

In the fact of a properly supported motion for Summary Judgment, the non-moving party may not simply rely on the pleadings or conclusionary statements. *Celotex v. Catrett*, 477 U.S. 317, 324. The non-moving party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Plaintiffs have sought to create a issue by construing the language of the Act such that a heightened requirement is produced. However, having attempted to recast the statute, Plaintiffs have failed to set forth any facts, properly supported, on which a reasonable trier of fact could find for Plaintiffs. Thus, the court finds that Plaintiffs have failed to show the existence of a genuine issue of material fact.

Next, Plaintiffs argue there exists a genuine issue of material fact whether plaintiffs were "commuting" while they participated in the BSC and BST Home Dispatch Programs. To support this position, Plaintiffs state that prior to its amendment in 1996, § 4(a) of the Portal Act, 29 U.S.C. § 254(a), introduced, but did not define, that term. Plaintiffs contend that the term "commuting", as used in

the amended § 4(a) of the Portal Act, 29 U.S.C. § 254(a), does not apply to their daily travels in BSC and BST vehicles from their homes to their first work sites and from their last work sites to their homes because their first and last work sites varied from day-to-day.

In construing the statute, words and phrases should be given their ordinary meaning based on custom and usage. The word commute is to, *inter alia*, "travel back and forth regularly or frequently." *Webster's Third New International Dictionary* (3d ed. 1981). Thus, the fact that a different synonym may have been sued in the Portal-to-Portal Act does not negate the meaning of the Act. Thus, no genuine issue of fact is created as to whether Plaintiffs were in fact engage [sic] in commuting.

Next, Plaintiffs argue that there exists a genuine issue of material fact whether plaintiffs were engaged in a "principal activity" when they received their daily first job assignments from BSC and BST by electronic means "off the clock" also known as "commute time."

Plaintiffs have produced no facts to support this proposition. The affidavits of Max Logan, Ronald Fairbanks, and the undisputed facts show that the activity described by Plaintiffs as "commute time" is incidental to the Plaintiffs use of the employer's vehicle for commuting. Plaintiffs cite and rely on *Baker v. GTE North, Inc.*, 927 F. Supp. 1104 (N.D. Ind. 1966), however, the facts in *Baker v. GTE* are distinguishable from the case at bar. Moreover, Congress in enacting the subject litigation, overruled *Baker v. GTE*, In *Baker*, the court found:

> that the plaintiff electricians' pre-shift activities, including the filling out time sheets, checking

> job locations, cleaning out and loading their trucks with the necessary materials, fueling the trucks, and picking up the electrical plans for the day's jobs, were within the broad range of "principal activities" performed at their employer's behest and for the benefit of the business." These activities would have been compensable had they been performed during the course of the workday."

927 F. Supp. at 1112.

The objective proof as set forth in defense affidavits militates against such a finding.

> If a technician did not wish to borrow his BST [or BSC] vehicle for commuting, he was required to leave his vehicle overnight at a BST [or BSC] marshaling yard. He would drive his personal car to the yard in the morning, where he would pick up his portable computer terminal (with the first assignment) and his truck. His compensable work time began at this point, He would then proceed through the work day, periodically receiving new assignment on his computer. At the end of the day, he would drive his truck back to the yard, where his compensable work day ended. He would then commute home in his personal car.
>
> An employee who elected to borrow his BST [or BSC] vehicle under the home dispatch program parked his BST [or BSC] vehicle at home. He received his first assignment at home on a portable computer – a process which took at most a minute or two, and which on many computers was completely automated and took no time at all. *He made no report to BST or [BSC]; he merely received the location of his first work site for the day.*

He traveled to the first assignment in the borrowed truck. His compensable work time started when he reached his first work site. He then proceeded through his day like any other technician. His compensable time ended as he left his last work site to drive the truck home. (Emphasis added)

Home dispatch employees in almost all instances drove ordinary mini-vans, vans, and pickups. The BST [or BSC] vehicles' complement of options was similar to that which one might find on any ordinary mini-van, or pickup. BST's [and BSC's] vehicles had automatic transmissions, power steering, power brakes, radios, etc. . . .

During the periods at issue in this lawsuit, home dispatch had *no* duties related to the BST [or BSC] vehicle while they were at home or during the drive to/from work. They were expressly instructed *not* to wash the truck, fuel the truck, service the truck, inspect the truck, etc., at home or during their commute. These tasks only were to be performed during the work day while the employee was on the clock.

The nature of the tools which each BST [and BSC] vehicle carried varied with the driver's job duties. Some trucks carried ladders and wire, as well as having built-in drawers for storage of small parts. However, other trucks carried much less. None of the tools or supplies which any home dispatch employee carried made during the BST [or BSC] vehicle in any way more difficult than the vehicle would have been without the tools and supplies. None of the hand tools or supplies required any attention or maintenance

from the driver while the driver was commuting to and from work.

* * *

By agreement with the union, home dispatch employees' commute from home to their first assignment or from their last assignment was less than 35 miles. For trips above 35 miles, the union contract specified that home dispatch employees would be paid a travel premium. In congested urban areas, the union had the option to negotiate a *shorter* distance which would trigger the travel premium. Furthermore, BST [and BSC] programmed its job-assignment computer to each home dispatch employee a first and last job which was a [sic] close as possible to his home. It was BST's [and BSC] experience that by virtue of this computer program, home dispatch employees' commutes were shorter than non-home dispatch employees' commutes to and from the marshaling yards. BST's [and BSC's] reason for this computer program was pragmatic; it wanted to minimize the mileage on the borrowed trucks.

Employees who borrowed a BST or [BSC] truck were asked not to carry alcohol in the truck and not to carry unauthorized passengers. The reason for this was to minimize BST's [and BSC's] additional liability exposure by virtue of letting its employees borrow BST [or BSC] trucks for commuting.

BST [nor BSC] employees were not required to wear any sort of uniform during the period at issue in this suit, either during the work day or during their commute. BST [and BSC] subsidized the purchase of work shirts for employees, and many employees wore these

> shirts. However, wearing these shirts was at each employee's discretion, and many chose not to wear them.

(Affidavit of Ronald Fairbanks); See also, Affidavit of Max Logan.

Based on the foregoing affidavits, the court finds that Plaintiffs did not engage in any compensable activity incidental to their use of the employer's vehicle. Thus, there exists no genuine issue of material fact as to this point.

Finally, Plaintiffs contend that in the absence of legislative findings, the due process clause bars the retroactive application of the Act. The court finds this argument to be contrary to well settled law, and therfore without merit. Congress has the power to enact legislation that has retrospective application. *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed. 2d 229 (1994).

Where the temporal effect of a statute is manifest on its face, there is no need to resort to judicial default rules for determining retroactive effect, and the inquiry ends. *Lockheed v. Spink*, 116 S.Ct. 1783 (1996). When Congress includes a provision that specifically addresses the temporal effect of the statute, that provision trumps any inferences that may be drawn. *Id.* Congress stated unequivocally that the Act applied to litigation pending at the time of the legislation.

CONCLUSION

Based on all the foregoing, there exists no genuine issue as to any material fact such that defendants BSC and BST are entitled to judgment as a matter of law. The Clerk is ordered to enter judgment this 3rd day of December 1996.

/s/ Bernice B. Donald
BERNICE B. DONALD
UNITED STATES
DISTRICT JUDGE